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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 562

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED, *Petitioners,*

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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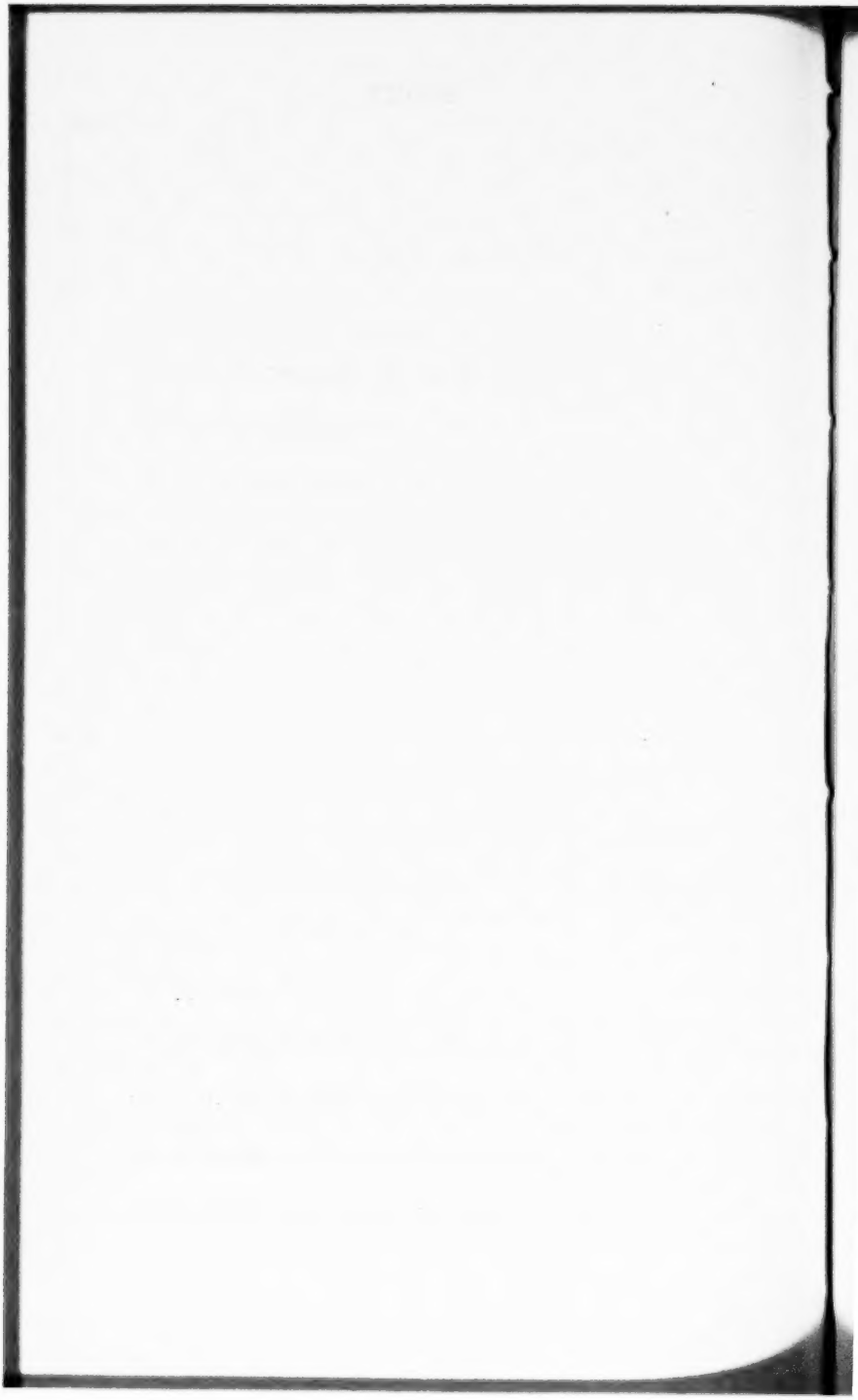

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FEDERAL DEPOSIT INSURANCE CORPORATION

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BRIEF FOR FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Opinions Below and Previous Rulings of This Court

The opinion of the trial court (Record, A * 475a-481a), the United States District Court for the Eastern District of Pennsylvania, is not reported.

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* The records on the three petitions for certiorari (Oct. Term, 1945, No. 880; Oct. Term, 1947, No. 697, and Oct. Term, 1948, No. 562), are herein designated A, B, and C, respectively).

The opinions of the United States Court of Appeals of the Third Circuit and the rulings of this Court on the two preceding petitions for certiorari, and on the petitions for rehearing thereof, listed in chronological order, are:

151 F. (2d) 907
327 U. S. 799
328 U. S. 877
328 U. S. 879
328 U. S. 881
329 U. S. 823
329 U. S. 830
163 F. (2d) 123
164 F. (2d) 469
334 U. S. 827
334 U. S. 862
169 F. (2d) 336
335 U. S. 838
335 U. S. 864
335 U. S. 894

Jurisdiction

The order sought to be reviewed was entered on November 15, 1948, by the United States Court of Appeals for the Third Circuit (C, 22). The petition for a writ of certiorari was filed on February 14, 1949. Petitioners rely upon Title 28, USC, Sec. 1254 (1). (Petitioners cite the repealed provision in Section 240 (a) of the Judicial Code as amended (Title 28, USC, Sec. 347 (a)).

Question Presented

Whether in the circumstances of this case the United States Court of Appeals correctly refused to permit the reopening of the judgment in this case.

Statement of the Case

More complete statements of the case are contained in our briefs in opposition to the two preceding petitions for certiorari (Oct. Term, 1945, No. 880; Oct. Term, 1947, No. 697). The following statement summarizes the earlier two, and brings them down to date.

The judgment is based on defendant Alker's note indebtedness to Integrity Trust Company (A, 508a).

Substantially all of the assets of the bank (including the Alker note) were assigned in 1940 to Federal Deposit Insurance Corporation (hereinafter abbreviated FDIC) as collateral security for a loan of some twenty million dollars (A,71a, 75a, 80a, 83a).

FDIC called the note, sold the collateral and brought this suit for the deficiency (A, 127a).

The defense was an alleged oral agreement between Alker and the bank not to call the loan or sell the collateral (A, 187a).

The District Court (Welsh, J. without a jury) found that there was no such agreement and entered judgment for plaintiff (A, 479a, 493a).

The United States Court of Appeals affirmed on the ground that such an agreement, not being reflected in any record of the bank, was a secret agreement and on the authority of *D'Oench, Duhme & Co.* v. *FDIC,* 315 U. S. 447, ineffective (151 F. (2d) 907).

This Court refused certiorari, denied two petitions for rehearing and three petitions for leave to file additional petitions for rehearing (327 U. S. 799; 328 U. S. 877, 879, 881; 329 U. S. 823, 830).

The mandate went from the Court of Appeals to the District Court October 24, 1946 (B, 4).

Alker then applied to the District Court for a new trial. The District Court continued the matter pending application to the Court of Appeals for leave to proceed in the District Court (B, 4).

Alker then applied to the Court of Appeals for such leave (B, 1). The Court of Appeals refused it (B, 30) (163 F. (2d) 123).

Alker then applied again for such leave based on different grounds (B, 32). The Court of Appeals again refused (B, 56; 164 F. (2d) 469).

This Court refused certiorari on May 24, 1948, 334 U. S. 827.

Alker then petitioned this Court for a rehearing and applied to the Court of Appeals for a stay of the mandate. Both applications were based on bills pending in Congress (C, 13-15).

This Court denied the petition for rehearing on June 21, 1948 (C, 1-2; 334 U. S. 862).

The Court of Appeals denied the motion to withhold the mandate on July 2, 1948 (C, 2). A motion for rehearing was filed July 7, 1948 (C, 2) and denied July 29, 1948 (C, 4; 169 F. (2d) 336). The mandate went down July 29, 1948 (C, 7).

By this time the loan of FDIC to Integrity Trust Company had been repaid in full, and the remaining assets pledged as security for the loan, including all rights under the Alker judgment, had been assigned to the Secretary of Banking, Commonwealth of Pennsylvania, the Statutory Receiver of Integrity Trust Company (C, 12). On July 28, 1948 FDIC moved the District Court to substitute the Secretary of Banking for it as party plaintiff (C, 11-13).

On August 25, 1948 Alker proceeded in three courts simultaneously, viz.:

In this Court he filed a petition for leave to file a supplement (based on the motion for substitution of party plaintiff) to the petition he had already filed (based on the pending bills in Congress) for leave to file, out of term, a second petition for rehearing (C, 16).

In the Court of Appeals he filed a petition to reconsider his motion for leave to the District Court to hear the motion for a new trial, which was also based on the motion for substitution of party plaintiff (C, 15-18).

In the District Court, without awaiting action on his applications to this Court and to the Court of Appeals,

and notwithstanding the mandate which had gone down to the District Court, he filed a renewal of the motion for a new trial (C. 17).

This Court dismissed the petition to it on October 11, 1948 (335 U. S. 838). The Court of Appeals dismissed the petition to it on October 27, 1948 (C, 18).

Alker renewed his applications to this Court on October 26, 1948, and to the Court of Appeals on November 1, 1948 (C, 19).

The applications were denied by the Court of Appeals on November 3, 1948 (C, 22) and by this Court on November 8, 1948 (335 U. S. 864).

On November 15, 1948 the Court of Appeals made the order (C, 22) which Alker seeks to have reviewed on the present petition for certiorari (Petition, p. 6). On November 9, 1948 Alker had applied for leave to file a "Petition for Reconsideration of Defendants' Motion for Leave to the United States District Court to Hear Motion for New Trial." This application was denied November 15, 1948 (C, 22).

On November 23, 1948 Alker filed in this Court a Petition for leave to file another petition for rehearing the second petition for certiorari. This was denied by this Court on December 13, 1948 (335 U. S. 894).

The present (third) petition for certiorari was filed in this Court February 14, 1949.

On March 3, 1949 the District Court made an order *granting* Alker's motion for a new trial, and denying the motion to substitute the Pennsylvania Secretary of Banking, Receiver of Integrity Trust Company, as party Plaintiff.

On March 16, 1949 FDIC petitioned the Court of Appeals for a writ of mandamus and prohibition, to enforce the mandate, to direct the District Court to vacate the order for a new trial and to prohibit it from proceeding with

a new trial. The Court of Appeals has issued a rule on Judge Welsh and the other judges of the District Court to show cause why the writ should not issue. This writ is returnable April 18, 1949.

Argument

The only action taken by the Court of Appeals within three months of the filing of the petition for certiorari, is its order of November 15, 1948. This order denies leave to file a "Petition for Reconsideration of Defendants' Motion for Leave to the United States District Court to Hear Motion for New Trial" (C, 22). The petition referred to is not attached to the Petition for Certiorari nor printed in the Transcript of Record.

On Alker's earlier petitions for rehearing the Court of Appeals received and denied the petitions. In this instance, it adopted the practice of refusing the application for leave to file the petition. In this practice it followed the precedent of this Court. This Court, on the first petition for certiorari, denied the writ (327 U. S. 799), denied the petition for rehearing (328 U. S. 877), granted leave to file a second petition for rehearing, but denied the petition (328 U. S. 879) and refused leave to file third, fourth and fifth petitions for rehearing (328 U. S. 881; 329 U. S. 823, 830). Likewise on the second petition for certiorari this Court refused the petition (334 U. S. 827), refused the petition for rehearing (334 U. S. 862) and refused leave to file subsequent petitions for rehearing (335 U. S. 838, 864, 894).

The reasons relied upon for allowance of the writ are substantially the same as those heretofore advanced in support of the second petition for certiorari and the numerous petitions for rehearing thereof (October Term, 1947, No. 697). As such they require no further consideration. These reasons are:

The Court of Appeals exceeded its authority when it weighed the after discovered evidence instead of "perfunctorily" referring the matter back to the District Court (Reasons 4 and 6 at page 9 of present petition; and at page 6 of present petition; and in second petition for certiorari (at page 6) and in first (at pages 3 and 4), second (at page 7) and third (at page 10) petitions for rehearing thereof).

The endorsements on the note (Reason 5 at page 9 of present petition; and in second petition for certiorari (at pages 9 and 13) and in first (at pages 4 and 5) and fourth (at page 9) petitions for rehearing thereof).

The bills pending in Congress (Reason 7 at page 9 of present petition; and in first (at page 6), second (at pages 6 and 7), third (at page 12), and fourth (at pages 10, 11, and 13) petitions for rehearing of second petition for certiorari).

The authority of FDIC to make the loan to the bank (Reason 5 at page 9 of present petition; and in third (at page 7) and fourth (at pages 5, 7 and 14) petitions for rehearing of second petition for certiorari).

The failure of FDIC to exact from each of the bank's debtors, a declaration of no set-off before it made the loan to the bank (Reason 9 at page 10 of present petition; and in third (at page 8) and fourth (at pages 7 and 13) petitions for rehearing of second petition for certiorari).

The reassignment of the Alker loan to the Bank's Receiver (Reason 10 at page 10 of present petition; and in third (at pages 11 and 12) and in fourth (at page 12) petitions for rehearing of second petition for certiorari).

The other reasons assigned are frivolous, viz.:

That due process of law has been denied because the Court of Appeals refused to entertain a ninth petition to review matters which had already been before them eight

times and had been decided on their merits (Reasons 1 and 2 at page 8 of present petition).

That the Court of Appeals which had already written four opinions must assign reasons for refusing to entertain a ninth petition (Reason 3 at page 9 of present petition).

We deem it proper to direct the Court's attention to certain serious errors of statement in the petition. The Court of Appeals had found that the evidence concerning the endorsement on the old notes was irrelevant to the rule of the *D'Oench Duhme* case because there was no evidence that these endorsements were on the notes at the time any bank examiner or representative of FDIC was in the bank. Alker now asks that this finding be reviewed and reversed because of the deposition of John Pellini, Jr. Alker cites the deposition of John Pellini, Jr., stating: "His depositions were taken on his return, and transcribed by the court stenographer, to the effect * * * that the old notes, when returned, bore the endorsements as to oral agreements as they now appear * * *" (pages 2 and 3 of petition) and "that he knew of his own knowledge that both sets of notes were at the same time in the possession of the bank for at least six weeks and during that period the bank examiner was there and saw both sets." (page 4 of petition)

These statements are repeated in petitioner's brief at page 17, making three statements in all to the effect that Mr. Pellini had deposed that the bank examiner had seen the notes with these endorsement on them.

There is no such testimony.

Mr. Pellini's deposition was taken on January 16, 1947. It is not printed in the transcript. We do not find it among the records of either the District Court or the Court of Appeals, and there is no entry in the dockets of those courts indicating that it was filed in either of them. We print his deposition in full as an appendix to this brief. It

will be seen that Mr. Pellini was asked no questions about the notes, or their endorsements and gave no testimony about them.

The loan of FDIC to the Integrity Trust Company has been repaid in full. FDIC has reassigned all rights under the Alker judgment to the Receiver of the Trust Company and has no financial stake in it. Nevertheless it is cited once more to answer a contention (which has been before this Court eleven times before) on the basis of testimony which does not exist. How long, we ask, will this litigant continue to abuse the patience of this Court.

Conclusion

We respectfully submit that petitioners again have not demonstrated that the case warrants the allowance of a writ of certiorari and that the petition for a writ, therefore, should be denied.

Respectfully submitted,

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APPENDIX

Deposition taken before Amelia H. Syren, Notary Public, at the office of Montgomery, McCracken, Walker, and Rhoads, Esquires, 1500 Morris Building, Philadelphia, Pennsylvania, on Thursday, January 16, 1947, at 4 o'clock p. m.

JOHN PELLINI, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Alker:

Q. What is your name?

A. John Pellini.

Q. What is your address?

A. My present address is 223 East Main Street, Pennsgrove, New Jersey.

Q. Where were you employed in 1937 or some years before and some years afterwards?

A. From 1934 to 1943 I was employed by Mr. Alker.

Q. In what capacity?

A. Well, I started out as a runner there and I finally wound up as officer manager taking care of the books, paying all bills, and all general office work.

Q. Did you on any occasions go to the Integrity Trust Company in reference to my loan?

A. Yes, sir, I did, on many occasions. Mr. Perrone and I both used to go. If he was busy on something I would go to the Integrity to pay the note, which was every month.

Q. Pay the interest?

A. That is right, sir, pay the interest on that note.

Q. Did you know any of the officers over there?

A. Oh, yes, I knew Mr. Brown, Mr. Winterbottom,—he was up in the real estate department—Mr. Conger, Mr. Semish.

Q. Did you have any conversations with any of those officers about my loan about 1937?

A. Yes, I did, with Mr. Senisk, because he was the man I used take the check to, and he would give it to a clerk to go in and get my receipt, and quite often I would sit and talk

to him, and I can recall a number of times I told him it was quite a heavy load that Mr. Alker was carrying. He said it was, but they had a lot of faith in Mr. Alker for the simple reason he had been paying his interest. He had an insurance policy. He had some sort of collateral against the loan. They had faith in him for the simple reason they knew Mr. Alker would eventually pay it off as soon as the market became better. We used to talk about that because the interest was so large, about $2500 a month plus the insurance I used to pay as collateral on that loan. As I can recall there was one insurance which had been extended from 1936 to 1946 which Mr. Semish had told me about, because I told him we were still paying the premium on it.

He said, "Yes, the insurance policy had been renewed for the simple reason they had agreed to continue the loan of Mr. Alker, to extend it, a continuation for ten more years. That is why they had renewed that policy. I was kind of happy about the whole thing because I knew how hard it was for Mr. Alker at times to get up that $2500 a month.

Q. Did you know the date to which he said the loan was extended?

A. I think that was about 1937. He said it would go to 1946. It would go for ten more years.

Q. Where have you been since February 1, 1943?

A. I have been in the army from about the first week of February up until the end of 1945.

Q. Where were you?

A. I was overseas most of the time.

Q. You just got back in 1945?

A. That is right, sir.

Cross-examination.

By Mr. Olmsted:

Q. Did you say you kept Mr. Alker's books?

A. John Perrone kept most of the books and I helped him on the books. Mr. Perrone left in 1941 and I continued on from there on in.

Q. Were you familiar with the books?

A. I was quite familiar with them.

Q. It was a fact that the dividends that Mr. Alker received from the stocks that were pledged as collateral exceeded the amount of the interest?

A. Not that I know of.

Q. You don't know whether it is so or not?

A. No, I don't because I never for the simple reason—what stocks do you mean? The stocks that were pledged as collateral?

Mr. Olmsted: I would like the record to show that Mr. Alker spoke to this witness in the middle of his answer.

By Mr. Olmsted:

Q. Don't pay any attention to Mr. Alker's statement and listen to me. You said you were office manager at the end and kept the books.

A. Yes, to a certain extent.

Q. Are you familiar with the dividends that were payable to Mr. Alker?

A. No, not all of them, no, sir. I wasn't familiar. At the present I couldn't remember, to be truthful with you, about those dividends.

Q. You don't know then whether or not the dividends that he received were greater or less than the amount of interest that he paid?

A. No, I wouldn't know, sir.

Q. Did you make out his income tax return?

A. No, sir, I didn't. He took care of them himself.

Mr. Olmsted: That is all.